



## DEPARTMENT OF TRANSPORTATION

### MATERIALS TRANSPORTATION BUREAU

WASHINGTON, D.C. 20590

57928

[49 CFR Parts 107, 171, and 175]

[Docket No. HM-168; Notice No. 78-131]

#### HAZARDOUS MATERIALS ABOARD AIRCRAFT

##### Proposed Rules

**AGENCY:** Materials Transportation Bureau (MTB), Department of Transportation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to amend certain regulations pertaining to the transportation of hazardous materials aboard aircraft. It proposes (1) a restatement of § 175.5 pertaining to the applicability of Part 175 by removal of the reference to "civil" aircraft and adding a specific exception for government-owned aircraft and, with certain limitations, aircraft operated on behalf of a government; (2) the removal of the exception for aircraft of United States registry under lease to and operated solely by foreign nationals outside the United States; (3) the adoption of a new § 175.31 to require the reporting of discrepancies relative to shipments of hazardous materials following their acceptance for transportation aboard aircraft; and (4) amend § 175.85 to provide an elaboration of the term "accessible" and to exclude certain classes of materials from the accessibility requirements of the section.

**DATES:** Comments must be received on or before February 15, 1979.

**ADDRESS COMMENTS TO:** Dockets Branch, Information Services Division, Materials Transportation Bureau, U.S. Department of Transportation, Washington, D.C. 20590. It is requested that five copies be submitted.

#### FOR FURTHER INFORMATION CONTACT:

A. I. Roberts, Associate Director for Hazardous Materials Regulation, Materials Transportation Bureau, Washington, D.C. 20590; phone (202) 426-0656.

#### SUPPLEMENTARY INFORMATION:

This notice addresses four issues involving the transportation of hazardous materials aboard aircraft. The principal drafters of this document are Alan I. Roberts and Lee E. Metcalfe of the Office of Hazardous Materials Regulation and George W. Tenley of the Office of Chief Counsel, Research and Special Programs Administration.

**Applicability of Part 175.** The issue concerning the definition of "public

aircraft" has existed for a number of years and basically surrounds the term "used exclusively." The MTB is aware that the matter has been the subject of litigation on at least one occasion and that there has been much confusion concerning the applicability of its regulations in this area. Therefore, the MTB proposes to remove the references to "civil aircraft" and "public aircraft" in Appendix B to Part 107, and §§ 171.8 175.1, and 175.5 and, in lieu thereof, to specifically except government-owned and operated aircraft and those nongovernment-owned aircraft that are under the exclusive direction and control of a government for a period of not less than 180 days as specified in a written contract or lease. The exception would not extend to government-owned and operated aircraft used for commercial purposes.

In determining whether a government does in fact have "exclusive direction and control" over a given aircraft, the MTB believes that the government must, under the terms of the contract or lease, exercise at least the following responsibilities:

1. Approval of crew members and the determination that they are qualified to operate the aircraft (as established by documents showing compliance with pertinent Federal Aviation Regulations);

2. Determining the airworthiness and maintenance of the aircraft (as established by documents showing compliance with pertinent Federal Aviation Regulations); and

3. Dispatching the aircraft, including times of departure, airports to be used, and the type and amount of cargo to be carried.

These criteria are proposed for inclusion in the proposed revision to § 175.5, and the MTB believes they are necessary to assure the safety of an operation not otherwise conducted under the jurisdiction of the Hazardous Materials Regulations.

By specifying a minimum time period, the MTB intends to exclude aircraft operated on behalf of governments for short periods from the exception and to make such operations subject to the Department's Hazardous Materials Regulations. By adoption of the proposed revision to § 175.5 without reference to either "civil" or "public" aircraft, the MTB believes the matter will be clarified to the benefit of all concerned and that the proposal is consistent with responsibilities assigned to the Department by the Hazardous Materials Transportation Act.

**Aircraft Leased to Foreign Nationals.** The MTB is proposing to remove the exception in § 175.5 pertaining to

aircraft of United States registry under lease to and operated solely by foreign nationals outside the United States. This action is being proposed in recognition of obligations imposed upon the United States through its membership in the International Civil Aviation Organization (ICAO) and its commitment as a signatory to the Chicago Convention. Chapter 3.5, Annex 6, Part 1 of the Convention provides that explosives and other dangerous articles, except where necessary for operation, navigation, or safety of an aircraft, may only be carried if their carriage is approved by the aircraft's state of registry and they are in conformance with the regulations of that state. Consequently, in the absence of a demonstrated need to retain the exception based on considerations of safety, United States obligations as imposed by the Convention dictate that the exception be deleted. Therefore, the MTB is proposing that the operations of such aircraft be subject to the same requirements as those applicable to U.S. flag carriers.

**Reports of Discrepancies.** The Airline Pilots Association (ALPA) has petitioned the MTB to amend the Department's Hazardous Materials Regulations to require aircraft operators to report to the Federal Aviation Administration (FAA) any hazardous materials package that is not prepared for shipment in accordance with Parts 172 and 173 of the regulations. The National Transportation Safety Board (NTSB) made a similar proposal through its Safety Recommendation A-26, issued March 26, 1974, as a result of its investigation of an accident which occurred at Logan Airport in Boston, Massachusetts, on November 3, 1973. Subsequent to the NTSB recommendation, the Department's Hazardous Materials Regulations pertaining to the transportation of hazardous materials aboard aircraft were completely revised in new Part 175. The MTB believes that new § 175.3 entitled "Unacceptable Hazardous Materials Shipments" and new § 175.30 entitled "Accepting Shipments" pertaining to the acceptance of shipments are responsive in part to the NTSB recommendation. However, no discrepancy reporting requirement was adopted at that time. The term "discrepancy" has been selected to preclude the connotation of prejudgment as to the existence of a violation, and the proposed reporting requirement would only apply following the acceptance of a shipment for carriage aboard aircraft. This is to preclude the burdensome reporting of attempts to obtain acceptance for carriage when carrier person-

nel readily recognize nonconforming shipments and refuse to accept them for carriage. The MTB is proposing to keep the reporting requirement as uncomplicated as possible while accomplishing its intended purpose and believes that its adoption will significantly improve safety through improved communication between aircraft operators and FAA personnel.

**Accessibility.** The MTB is proposing to amend Section 175.85 to specify the circumstances under which a hazardous material will be considered in a location accessible to a crew member during flight. This a matter that has been at issue for several years since no definition of the term "accessible" has been provided by regulation in the past. This lack of definition has resulted in a number of different and conflicting interpretations, and the MTB believes that the matter should be resolved by the amendment proposed in this rulemaking. ALPA has petitioned for a much lengthier elaboration of the accessibility requirement, but the MTB believes that the brief description of what it considers to be accessible would result in the same limitations ALPA proposes. For example, ALPA suggests language pertaining to accessibility to hazardous materials on pallets or in containers. The proposed rule would require that the material be loaded so that it can be seen and handled. ALPA recommends that a hazardous materials package be placed so that a crew member will have unobstructed access from at least one side of each hazardous material package from a walkway (isle) and that there be sufficient space available to permit isolation of the package if necessary. The proposed rule would require that the material be loaded in such a manner that it can be separated from other cargo during flight. ALPA suggests that hazardous materials packages may be loaded one on top of the other provided each package is accessible from at least one side. The proposed rule would not preclude stacking of packages so long as they can be seen, handled, and separated from other cargo during flight.

The MTB believes that there are several kinds of hazardous materials that should not be subject to the accessibility requirement of § 175.85. These are materials that would pose no significant risks to the structural integrity of an aircraft and may be safer to carry in inaccessible locations that are not in proximity to crew members. The MTB proposes to exclude the following from the accessibility requirement: radioactive materials; poison B, liquids or solids (except those labeled FLAMMABLE); and irritating materials.

For purposes of clarity, the latter portion of § 175.85(b) pertaining to the operation of single pilot, cargo-only aircraft would be placed in a revised paragraph (c) and the regulation presently found in paragraph (c) would be transferred to new paragraph (f). No substantive changes to these regulations are proposed.

In consideration of the foregoing, Parts 107, 171, and 175 would be amended as follows:

#### **PART 107—PROCEDURES**

##### **Appendix B [Amended]**

1. Appendix B to Part 107 would be amended by deleting the word "civil" in the second subtitle and the introductory text thereafter.

#### **PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS**

##### **§ 171.8 [Amended]**

2. Section 171.8 would be amended by deleting the definitions for "Civil aircraft" and "Public aircraft."

#### **PART 175—CARRIAGE BY AIRCRAFT**

3. Section 175.1 would be revised to read as follows:

##### **§ 175.1 Purpose and scope.**

This part prescribes requirements, in addition to those contained in Parts 171, 172 and 173 of this subchapter, applicable to aircraft operators transporting hazardous materials aboard (including attached to or suspended from) aircraft.

4. Section 175.5 would be revised to read as follows:

##### **§ 175.5 Applicability.**

(a) This part applies to the acceptance for transportation, loading, and transportation, of hazardous materials in any aircraft in the United States and in aircraft of United States registry anywhere in air commerce. This Part does not apply to—

(1) Government-owned and operated aircraft other than aircraft engaged in carrying persons or property for commercial purposes; and

(2) Aircraft not owned by a government but under exclusive direction and control of a government for a period of not less than 180 days as specified in a written contract or lease.

(b) For the purposes of paragraph (a)(2) of this section, an aircraft is under the exclusive direction and control of a government when that government exercises responsibility for—

(1) Approving the crew members and determining that they are qualified to operate the aircraft;

(2) Determining the airworthiness and maintenance of the aircraft; and

(3) Dispatching the aircraft, including the times of departure, the airports to be used, and the type and amount of cargo to be carried.

5. Section 175.31 would be added to read as follows:

##### **§ 175.31 Reports of discrepancies.**

(a) Each person who discovers a discrepancy relative to the shipment of a hazardous material following its acceptance for transportation aboard an aircraft shall, as soon as practicable, notify the nearest Air Carrier District

Office, Flight Standards District Office, or General Aviation District Office (as appropriate) by telephone and shall provide the following information:

- (1) Name and telephone number of the person reporting the discrepancy.
- (2) Name of aircraft operator.
- (3) Specific location of the shipment concerned.
- (4) Name of the shipper.
- (5) Nature of discrepancy.

(b) For the purposes of this section, discrepancies which must be reported in accordance with paragraph (a) of this section include—

- (1) Incorrect entries and certifications on shipping papers;
- (2) Quantities of hazardous materials in excess of maximums permitted per package;
- (3) Incorrect marking, labeling and packaging; and
- (4) Instances of packages and baggage found to contain hazardous materials subsequent to their being offered and accepted as other than hazardous materials.

6. In § 175.85, paragraph (b) would be revised, paragraph (c) would be redesignated as paragraph (f), and a new paragraph (c) would be added as follows:

**§ 175.85 Cargo location.**

(b) Each person carrying a package containing a hazardous material acceptable only for cargo-only aircraft shall carry the package in a location accessible to a crew member during flight. To be considered accessible, the package must be loaded in such a manner that it can be seen, handled, and separated from other cargo during flight. This paragraph does not apply to—

- (1) Radioactive materials,
- (2) Poison B, liquids or solids (except those labeled FLAMMABLE), and
- (3) Irritating materials.

(c) Notwithstanding the provisions of paragraph (b) of this section, when materials acceptable for cargo-only or passenger-carrying aircraft are carried on a small, single pilot, cargo-only aircraft being used where other means of transportation are impracticable or not available, they may be carried without quantity limitation as specified in § 175.75 in a location that is not accessible to the pilot if:

(1) No person other than the pilot, an FAA inspector, the shipper or consignee of the material or a representative of the shipper or consignee so designated in writing, or a person necessary for handling the material is carried on the aircraft.

(2) The pilot is provided with written instructions on characteristics and proper handling of the material.

(3) Whenever a change of pilots occurs while the material is on board, the new pilot is briefed under a hand-to-hand signature service provided by the operator of the aircraft.

NOTE.—The Materials Transportation Bureau has determined that this document does not contain a major proposal requiring the preparation of an economic impact statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107 nor an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321 et seq.).

Issued in Washington, D.C., on December 1, 1978.

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